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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 CMG HOLDINGS GROUP, et al.,

4 Plaintiffs,

5 v.

15 Civ. 5814 JPO

6 JOSEPH WAGNER,

7 Defendant.

8 -----x

11 November 27, 2018
12 3:10 p.m.

15 Before:

16 HON. J. PAUL OETKEN,

17 District Judge

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1 (In open court)

2 (Case called)

3 THE COURT: Good afternoon.

4 I had scheduled this conference I don't know, a month
5 or two ago, and this was intended to be after the close of fact
6 discovery. I since received some letters from the parties
7 starting with a November 1st joint letter with each side's
8 position on the production and identification of allegedly
9 deleted files from hard drives, servers and USB drives.

10 I gather that's the main dispute. Let me just before
11 I get into that, depositions were to be completed and all fact
12 discovery other than this hard drive issue were to be completed
13 November 18th. That is all done, fact discovery is done?

14 MR. O'CONNOR: Your Honor, yes. There is another
15 issue. I filed a letter this morning. There is the November
16 21 letter and there is my letter from this morning. Other than
17 that, there are no open issues I am aware of.

18 THE COURT: Depositions are done?

19 MR. O'CONNOR: They are of the fact witnesses.

20 THE COURT: You agree with that?

21 MR. MATTHEWS: I do, your Honor.

22 THE COURT: What's the plan for expert discovery?

23 There is a date for plaintiffs' expert disclosure in
24 two days and defendant's expert disclosure in December. Are
25 you going to hire an expert?

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1 MR. O'CONNOR: I am. I have a forensic accountant,
2 and I anticipate giving that disclosure on Thursday of this
3 week. I know counsel has approached me on getting a little bit
4 of time on his end because of holidays, and I expressed to him
5 giving a him a few weeks is perfectly fine with us.

6 THE COURT: Meanwhile, there is a motion for partial
7 summary judgment which I haven't had a chance to review, and I
8 know that that is filed by plaintiff, and I assume, Mr.
9 Matthews, you're planning to respond to that?

10 MR. MATTHEWS: We are, your Honor.

11 I have spoken with counsel about asking for a briefing
12 schedule that would contemplate having the defendants put their
13 response in a week from this Friday, which I believe is
14 December 7th, and plaintiff would have two weeks thereafter to
15 put in reply papers, with the court's permission, of course.

16 THE COURT: Is that right?

17 MR. O'CONNOR: That is, your Honor, that is
18 acceptable.

19 THE COURT: That is fine. Were you going to -- I
20 know, Mr. Matthews, you talked about filing a summary judgment
21 motion. Is that still your plan?

22 MR. MATTHEWS: Plan to file a motion for partial
23 summary judgment on some of my claims and some of my client's.
24 Counsel and I had a discussion about when that motion would be
25 filed. As I read your Honor's individual rules and local

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1 rules, I believe it would be prudent, my deadline would be
2 within 14 days after the close of all discovery which includes
3 expert discovery. I would like confirmation of that because we
4 haven't had a discussion.

5 THE COURT: That is the general rule, although I don't
6 require premotion conferences. If you want to file earlier
7 than that -- some people file a motion for summary judgment
8 before expert discovery because it doesn't implicate expert
9 discovery, but if it is going to -- if you want, you can do it
10 later. The default is two weeks from the close of all
11 discovery including expert discovery.

12 MR. MATTHEWS: Thank you, your Honor.

13 THE COURT: You would wait until after experts?

14 MR. MATTHEWS: I want to wait until at least my expert
15 reviews the hard drives that remain at issue and I hope to
16 discuss with the court today.

17 THE COURT: So you're not going to move for summary
18 judgment on all claims?

19 MR. MATTHEWS: Not an all claims, no, but I will be
20 moving on some claims.

21 THE COURT: There will be a trial --

22 MR. MATTHEWS: There will be a trial.

23 THE COURT: -- on some claims and counterclaims or
24 just claims?

25 MR. MATTHEWS: The plaintiff, the third-party

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1 defendants have moved for partial summary judgment on the
2 third-party complaint.

3 THE COURT: Which is defamation?

4 MR. MATTHEWS: Defamation, which will be --

5 THE COURT: But there will be a trial one way or
6 another?

7 MR. O'CONNOR: Correct.

8 MR. MATTHEWS: Yes, sir.

9 MR. O'CONNOR: I should point out to the court we are
10 attempting to get a mediation under way. There was going to be
11 a trial. On the partial summary judgment, I should point out
12 to your Honor, we also moved to strike the affirmative defense
13 directed at the unclean hands defense. Your Honor has written
14 on that subject. We filed a motion to strike that affirmative
15 defense. It will be important to have that ruled on.

16 MR. MATTHEWS: Just so I am clear, counsel, that is
17 the subject of briefing schedule we just discussed?

18 MR. O'CONNOR: That's correct.

19 THE COURT: Very good.

20 MR. MATTHEWS: If I may. While we were just
21 discussing the expert discovery, counsel alluded to a
22 conversation he and I had about whereas I asked to extend
23 defendant's time to make expert disclosures because it is not
24 on December 30th, which I don't think it was anticipated or
25 intended. It was just a continuation of prior deadlines, and I

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1 was hoping to push that back to January 15th which would, in
2 turn, I would request that we would push back the end date for
3 expert discovery from February 1st to February 15th or 14th,
4 whatever.

5 MR. O'CONNOR: That is acceptable. Your Honor, that
6 is perfectly fine.

7 THE COURT: That is fine. Defendant's expert
8 disclosures -- let's step back. Plaintiffs' expert disclosures
9 will still be November 29th. Is that right?

10 MR. O'CONNOR: Yes, your Honor.

11 THE COURT: Plaintiffs' expert disclosures November
12 29th. Defendant's expert disclosures will now be January 15th,
13 2019, and all expert discovery completed February 15.

14 Did I get that right?

15 MR. MATTHEWS: I think that is what I have written
16 down. Yes, your Honor, that is what I propose.

17 THE COURT: That is fine. That would make any motion
18 for summary judgment due, the default would be basically March
19 1st. I could give you a little more than that if you want.

20 MR. MATTHEWS: I would greatly appreciate a little
21 more than that, your Honor.

22 THE COURT: Are you going to be moving for summary
23 judgment on the RICO claims?

24 MR. MATTHEWS: Yes, your Honor, on the RICO claims.

25 THE COURT: How about 30 days from the end of

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1 discovery?

2 MR. MATTHEWS: That would be excellent.

3 THE COURT: We'll say March 15th for summary judgment
4 motions.

5 MR. MATTHEWS: Thank you.

6 THE COURT: Mr. O'Connor, plaintiff is not going to be
7 moving for any summary judgment on anything other than what
8 they already filed. Is that right?

9 MR. O'CONNOR: Currently I don't anticipate doing so,
10 but I would obviously want to see what their motion looks like.

11 THE COURT: Okay. Good enough. That is the easy
12 stuff. We should start with the issue of the hard drive. Do
13 you want to start, Mr. Matthews?

14 MR. MATTHEWS: Yes, your Honor.

15 The issue with the hard drives emanates from a motion
16 for protective order that the plaintiff made in October.
17 Defendants opposed the protective motion for protective order.
18 The court denied the motion for protective order and issued a
19 ruling requiring the production of the hard drives on or before
20 a date at the end of October.

21 Plaintiff and defendants consulted in good faith to
22 work out an arrangement so that we could facilitate compliance
23 with the order and review of the hard drives. That resulted in
24 an order, Docket No. 122, that required the identification of
25 hard drives that contain evidence of deletion of data by

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1 defendants that plaintiffs intend to submit to the court at
2 trial by way of fact or expert discovery or that otherwise
3 contain evidence of deleted data that plaintiff alleges were
4 improperly deleted by any of the defendants.

5 That was due to be held on November 9th. Counsel and
6 I had numerous communications about that, and the letters have
7 been submitted to the court for review. I believe plaintiffs'
8 position is that all of the drives contain evidence of data
9 deletion and that they also intend to prove their claims of
10 data deletion through other evidence, including emails and
11 invoices from the former information technology consultant used
12 by XA and also used by my clients Hudson Gray.

13 My response to that is I am surprised that all of the
14 data, all of the drives contain evidence of data deletion
15 because that is why we worked out the stipulation in the first
16 place so that we could learn from plaintiffs' vendor which
17 drives, in fact, had evidence of data deletion.

18 In addition, your Honor, if you recall many moons ago
19 there was a dispute over the first production of documents from
20 the plaintiff under prior counsel. They produced approximately
21 590,000 pages of documents that they claim were recovered by
22 their IT specialist. Recently plaintiff provided me with a
23 loaded file that identifies approximately 57,000 documents of
24 files that they claim were "restored," which I assume is the
25 same thing as "recovered."

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1 In any event, I don't see how there could be 590,000
2 pages in one production, 57,000 documents in another
3 production, and that their IT specialist cannot identify which
4 of the 28 different drives that they're holding, one of which
5 is identified as a New York server on the index, and give, so
6 we can give it to our computer expert to say okay, I need
7 Drives 1, 5, 7, however many it is.

8 I am hopeful it is not all 28 because that would be
9 quite expensive for my clients to engage their expert to
10 review, and that's contrary to the intention, I believe, of the
11 parties when we entered into the stipulation that the court so
12 ordered. So the question of whether or not the plaintiff is
13 obligated to produce the drives, I submit, is not for the
14 court's consideration today. There is also a court order
15 requiring it. The question is which drives should plaintiff
16 provide, all or some portion of them?

17 THE COURT: What is the problem with their providing
18 all of them as long as they meet what they agreed to do in the
19 stipulation, which is to identify with specificity which, if
20 any, of the computer hard drives, et cetera, contain evidence
21 of deleted data?

22 MR. MATTHEWS: If they will state clearly so that all
23 of them contain evidence of deleted data, I have to take all of
24 them. That was not my understanding of some of the
25 communications. That is my understanding now, but I will defer

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1 to counsel in that regard.

2 THE COURT: Mr. O'Connor, would you like to respond?

3 MR. O'CONNOR: Yes, your Honor.

4 When the stipulation was filed, the universe was far
5 different than it became after we served about five or six
6 subpoenas on non-parties. We learned things that no one had
7 any idea had occurred here.

8 The stipulation was an effort by me to say to counsel
9 look, if I can identify for you that they only deleted from 4
10 out of 10 hard drives, I'll try to do that for you. That was
11 the intent of that stipulation. It says I will identify with
12 specificity which drives have deleted data on them, whether I
13 am going to prove that with fact or expert testimony.

14 We have the deposition of Pedro Faria, F A R I A. He
15 is an IT professional that they hired. He has corroborated
16 that they deleted data from all the New York desktops that he
17 saw in that office. We have now a treasure trove of documents
18 from Mr. Tuma, an IT professional in Chicago that these guys
19 secretly hired to raid all of our computers.

20 We have his file. We have this entire roadmap. He
21 laid out in a roadmap email to Mr. Wagner when he left us in
22 early or late February. Here he is in May, the guy has been
23 gone months, describing how he is going to raid our computers
24 and work with someone in Chicago, still there, Jean Wilson, and
25 use a raid device to get the last bit of data when she resigns.

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1 THE COURT: Is this the same as deleted data,
2 allegedly improperly deleted data?

3 MR. O'CONNOR: Yes. Counsel says to your Honor that I
4 gave him a load file. I gave him a file that shows him 57,000
5 documents that they deleted, precisely the path that they were
6 deleted from, and where he can find them in the current
7 production.

8 I don't know what else they want from me, and we are
9 willing to give them all the drives. If they want to spend a
10 hundred thousand dollars to go after this, then go right ahead,
11 but the proof and truth is they deleted all our data, and they
12 took it, Mr. Wagner just admitted two weeks ago that he took a
13 USB drive, he stuck it in a computer and he stole his entire
14 Outlook.

15 THE COURT: When you say, "deleted," copying is
16 different from deleting. You are saying they got rid of a data
17 and put it on a drive and took it?

18 MR. O'CONNOR: They did a combination of things.

19 Mr. Wagner decides he is leaving XA in late 2013. He
20 embarks on this huge IT infrastructure program, spending all
21 this money to have everything upgraded and have everything put
22 in the cloud. Then he has somebody come into the New York
23 office, they tell this IT guy, who testified under oath, he was
24 told that the New York office is breaking away. It was true.
25 We didn't know about it, but they told him. They let him in on

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1 it. We are breaking away, wipe the computers. The guy
2 testified he was brought in to do this.

3 THE COURT: You're talking about Tuma?

4 MR. O'CONNOR: Pedro Faria in New York, and Mr. Tuma
5 hasn't testified, but I subpoenaed his records, and in his
6 records -- I have been doing this 23 years -- I have never seen
7 something like this so blatant what they did. It lays out a
8 roadmap. He told them this is all the things I'm going to do.

9 So what they did, they moved everything off of the
10 hard drives in New York onto the Winstream Server, cloud-based
11 server, and they wiped the stuff clean in New York. In Chicago
12 they waited. When Ms., as you know from the decision,
13 Ms. Wilson stayed behind for four or five months. So why does
14 she stay behind? She wanted to make sure all the vendors got
15 paid.

16 THE COURT: Vendors got what?

17 MR. O'CONNOR: Got paid for the MBC projects, made
18 sure all the vendors on the past project got paid because they
19 were going after those same clients, they were working with the
20 same clients from day one.

21 Judge, they told the court they looked, got you all
22 the personal emails. They did no such thing. We can prove now
23 the whole time Jean Wilson is in Chicago, they're in New York,
24 four floors up with this competitive firm. He she is talking
25 to them privately.

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1 THE COURT: I realize this is stuff you are going to
2 have a different version.

3 MR. MATTHEWS: I have an absolutely different version,
4 your Honor.

5 MR. O'CONNOR: The bottom line is he can have all the
6 drives tomorrow.

7 THE COURT: Here is my question about the drives. You
8 have identified, your position is that the 57,000 identified
9 documents, with a path on that thing, that that is the universe
10 of improperly deleted files, or is it something else?

11 MR. O'CONNOR: That is what we will show a jury
12 someday, that is what they deleted and what Mr. Faria
13 recovered.

14 THE COURT: But the 57,000, can you connect those
15 57,000 to certain drives?

16 MR. O'CONNOR: We have a template that tells you which
17 drives are from New York, which are from Chicago.

18 THE COURT: And identify drives by --

19 MR. O'CONNOR: Mr. Pedro Faria came up with a list.
20 Item 21 is from New York. Item 25 is from New York. I offered
21 to give that to counsel. At the end of the day, I don't
22 understand what it does for anybody.

23 For them to spend -- it is their money, but at the end
24 of the day you have what you have. You have witness testimony.
25 He was brought in to wipe these computers clean. I shouldn't

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1 be precluded from having him testify. On what basis?

2 THE COURT: Perhaps that will be admissible, who knows
3 when we get to trial, but there is no reason not to produce
4 what I have directed to be produced. In addition, you need to
5 comply with the part of the stipulation which says you will
6 identify with specificity which, if any, of those drives,
7 storage devices or servers contain evidence of the improperly
8 deleted data.

9 MR. O'CONNOR: I have done that. I believe I did that
10 in my November 2nd letter. I told them they deleted data from
11 all the hard drives. This was part of an IT upgrade where they
12 took everything off the computers and put it all in the cloud.
13 That is what they did. Pedro testified to that. The emails
14 and the invoices from Tuma demonstrate that is exactly what
15 they did.

16 What more specificity can I give? I don't know.

17 THE COURT: Mr. Matthews?

18 MR. MATTHEWS: You hit it on the head. If this load
19 file that has 57,000 files referenced in it, plaintiffs should
20 be responsible to tell you where those individual files are as
21 opposed to just saying you deleted everything so it is on every
22 drive and we have to spend untold thousands of dollars looking
23 at each drive to determine where it is there is supposed
24 deletion, especially when, your Honor, I submitted a
25 declaration from Mr. Tuma who was accused of participating in

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1 this scheme, laying out in great detail that there was no such
2 scheme and that there was nothing more than a commonplace
3 transfer of information from physical servers to services
4 hosted by the cloud. Counsel can argue about that. Plaintiff
5 can argue that is not incorrect, and we have a jury or the
6 court decide that at the appropriate time.

7 We're allowed to have our computer expert, not Mr.
8 Tuma, but our expert expert look at the physical drives and say
9 here is evidence of deletion, and it is just not deletion, your
10 Honor, there is a difference between deleting redundant backed
11 up information and deleting information so that it can never be
12 accessed again. There is archiving gone on all the time in
13 companies when they have back up IT. That is commonplace in
14 the industry.

15 What the plaintiff is alleging is that my clients took
16 the information to Hudson Gray and then deleted it so that XA
17 would not have it available to it. We know that is not true
18 because Pedro himself testified a year and a half ago he
19 recovered this information not less than three weeks after Jean
20 Wilson left.

21 THE COURT: Is that the 57,000?

22 MR. MATTHEWS: I don't know what that is. That led to
23 590,000. Counsel is stating the 57,000 files show exactly from
24 which servers they came from. There is no reason for them not
25 to be able to say here are the servers and here are the files

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1 on those servers that have been deleted.

2 THE COURT: It sounds like they have given you that.

3 MR. MATTHEWS: They have given us a load file that has
4 57,000 entries and on it. It states the file name and states
5 the production number from which the file name was produced.
6 That is what we have had. We communicated with counsel and I
7 attempted to have our IT personnel have a conference call and I
8 was rebuffed.

9 So when you look at that, that would require somebody
10 to match up 57,000 different entries amongst 22 different
11 document productions. That would take months. I would not be
12 able to do it. That is not an inspection of the hard drives.
13 We accepted the information in the stipulation that plaintiff
14 would tell us which of the hard drives have evidence of
15 deletion, not just every one.

16 In fact, when we crafted the stipulation at the time,
17 I agree with counsel, it was his opportunity to work in good
18 faith to try to work it out. United Lex was not prepared at
19 that time to specify which of the hard drives would be required
20 to be reviewed in this situation. We gave them time, and they
21 came back to us and said every one of them. I don't think that
22 is compliance with the order.

23 THE COURT: What do you want me to order them to do?

24 MR. MATTHEWS: I would like you to identify which of
25 the drives, the 57,000 thousand files are contained.

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1 THE COURT: Can you do that?

2 MR. O'CONNOR: All of them. You just heard him, they
3 did it to clean up, right.

4 THE COURT: Each of the 57,000, can you say this one
5 is this server or this file?

6 MR. O'CONNOR: He is incorrect. The load file
7 provides the exact path where it came from. It shows you whose
8 computer it came from. I don't know what else I can do for
9 these people, Judge. At the end of the day, they claim Mr.
10 Tuma is talking to the former CEO in the summer of 2014 -- he
11 has been gone months -- how to wipe clean Chicago. Really?

12 If you want to argue that to a jury, go right ahead.
13 I don't know what to do for them. I will give them all the
14 drives. They can have them tomorrow. It will take a few days
15 because they're very heavy, but we have explained to them and
16 they admit they deleted data from all the computers. They were
17 doing, in their view, they were doing us a favor by putting it
18 all in the cloud. That is what their theory is going to be.

19 THE COURT: I think you should take the data and see
20 if, in fact, the path identified on the 57,000 spreadsheets
21 will allow your expert to go to a specific place in the
22 servers.

23 MR. MATTHEWS: What you're proposing is we accept all
24 of the drives?

25 THE COURT: Yes.

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1 MR. MATTHEWS: And use the load file with 57,000 files
2 on it to determine whether we can identify? I accept that
3 proposal, your Honor.

4 THE COURT: And see if it is doable. If not, you
5 might have to have a meet-and-confer, and I may order you to
6 provide more information on the 57,000. You should provide it
7 and see if your accountant, your forensic person is able to use
8 it with the path provided by the spreadsheet to get the
9 information.

10 MR. O'CONNOR: Thank you.

11 THE COURT: See if that works.

12 MR. MATTHEWS: Thank you.

13 THE COURT: What else is disputed?

14 MR. O'CONNOR: The issue I addressed in my letter is
15 this. There are two memos the defendants claim they wrote to
16 management at XA. One is in 2009. The other is in 2014. As I
17 told your Honor, we got Mr. Wagner to say he stole this whole
18 Outlook folder, all his Outlook, all his documents. He took a
19 USB device, stuck it in the computer without any authority and
20 took it with him.

21 The problem is we don't have this Outlook folder. It
22 is gone. It is one of the things they deleted. If you look at
23 the production in this case, there were very few emails from
24 Mr. Wagner to anybody. There is a memo they claim they gave to
25 XA management and CMG management in '09 that had a line item

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1 that says Studio AG, I don't know the exact, but that somehow
2 disclosed these folks had their own company.

3 No one has cooperated. The only people that are
4 willing to say that under oath are the defendants. There is no
5 contemporaneous documentation. I have asked to give me the
6 folder. They have given me the 2009 memo. They gave it to me
7 in electronic form so I can check the meta-data and see when it
8 was created. They won't --

9 THE COURT: 2009 memo?

10 MR. O'CONNOR: The 2009 memo Mr. Wagner claims he gave
11 to management where he claims he disclosed they formed this
12 other company to support XA's business. That is the argument
13 for me.

14 I have asked to have the memo in electronic form or
15 some representation you tried to find it and you couldn't. How
16 is it that there is no proof that this went to management?
17 Where is the email conveying, the email back saying thanks for
18 the memo. There is nothing like that.

19 I asked for this a while ago. He waited until after
20 the discovery end date and he says to me it is too late, sorry,
21 I am not going to comply. The other memo is a 2014 memo
22 Mr. Wagner claims he gave to another gentleman at CMG. Again
23 the same question, I would like that memo in electronic form.
24 They refused to give it to me.

25 THE COURT: Is this the subject of your November 27th

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1 letter?

2 MR. O'CONNOR: It is, your Honor. I was told that I'm
3 too late, even though the request was made prior to the end of
4 the fact discovery period. I was told I am too late.

5 THE COURT: Is this why you attached Wagner's
6 deposition?

7 MR. O'CONNOR: Yes. He admits he took his Outlook
8 folder with him. I don't have access. On my side, I can't
9 possibly find this document in my production. They deleted it
10 and he took it with him. I have asked them go to Mr. Wagner's
11 file he says he took and give me the memo or give me an email
12 conveying the memo.

13 THE COURT: The memo is from when?

14 MR. O'CONNOR: There are two memos. There is one in
15 '09 and one in 2014. He admitted he has his own Outlook
16 folder. It would take him all of two minutes to look for that
17 memo if it really exists. We suspect it doesn't exist. We
18 suspect it was created for the occasion, which explains why
19 they won't give it to us in electronic form.

20 THE COURT: What do you mean, for the occasion?

21 MR. O'CONNOR: We don't believe it was created back in
22 '09. There is no evidence the company had this memo. They
23 came up with it in the litigation. They said yeah, we gave
24 this to Mr. Ennis in '09. Mr. Ennis has no recollection
25 whatsoever of this.

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1 THE COURT: You're saying it is a fabricated document?

2 MR. O'CONNOR: We do.

3 THE COURT: Mr. Matthews?

4 MR. MATTHEWS: We do. There are a lot of statements
5 what people are saying and people are doing where there is
6 absolutely no basis for. Starting with Mr. Ennis, he claims he
7 never saw the email. Mr. Ennis has not been deposed. There is
8 no evidence of what Mr. Ennis saw, heard or did. All we know
9 is that Ennis was forced out of the claim when Mr. Lake
10 threatened him with a RICO lawsuit in 2010.

11 My clients are prepared to testify, Joe Wagner and
12 Darryn Andorak, they spoke to Mr. Ennis in 2009 about formation
13 of this company Studio AG. Studio AG is a defendant in the
14 action. They wrote a memo, Wagner wrote a memo he had a
15 face-to-face discussion with Mr. Ennis, CMG representative, and
16 he said because CMG was buying certain of the assets and
17 companies of the then constituted XA business, it was not going
18 to buy a company called Fury XA. Fury XA served as a decor and
19 floral provider to service XA's clients as well as any other
20 clients it could generate on its own.

21 Due to the jettison, the fact they were going to
22 jettison that business, Darryn Andorak, Jean Wilson, Joe Wagner
23 and Estelle Pizzo decided we will form Studio AG, and Joe
24 Wagner discussed that with Jim Ennis, so did Andorak, and
25 they're prepared to testify what they did and there is a

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1 contemporaneous memo. Not only is there a contemporaneous
2 memo, if you look at XA's financial records going forward, you
3 will see payments to Studio AG throughout the course of dealing
4 of the next several years. In fact, it was not hidden at all
5 what they were doing with Studio AG.

6 Ms. Lake testified just recently in her deposition I
7 believe that she spoke with Jim Ennis, and Mr. Ennis told her
8 he never heard of Studio AG. That is hearsay that is
9 inadmissible. My client's testimony is that they provided the
10 memo to Mr. Ennis is not hearsay because they will be in court
11 to testify about it and be cross-examined on it.

12 In addition, your Honor, counsel did not make the
13 request a long time ago. He made the request two weeks ago
14 after the document discovery period had concluded and asked for
15 the electronic version of the documents. I have conferred with
16 my clients. They do not have an electronic version of the 2009
17 memo or the 2014 memo. They provided it to me from a paper
18 file that my client had in his possession.

19 THE COURT: So you're saying there is no electronic
20 form?

21 MR. MATTHEWS: According to my clients, there is no
22 electronic file of this.

23 THE COURT: There is not a version attached to email?

24 MR. MATTHEWS: With respect to the 2014 memo, again we
25 don't have an electronic version of it. I wish we did. I am

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1 surprised it was not in 590,000 pages of documents XA was able
2 to recover, but we'll argue about that another time.

3 There is an affidavit from Ronald Burkhardt, who states
4 he received the memo and discussed it with Studio AG, Joe
5 Wagner. Now, Mr. Burkhardt, in his deposition testimony in
6 another case, a companion case, he won against XA which failed
7 to pay him, and on trial also testified that he didn't know
8 Studio AG.

9 His credibility goes to the weight of the evidence.
10 It doesn't go whether or not that memo exists, and I think that
11 is what counsel is arguing prematurely now. This really should
12 be a motion in limine that we address right before trial rather
13 than a Rule 37 motion to preclude us from referring to a
14 document simply because it wasn't contained in an email or
15 didn't have an electronic version of it.

16 I just received this letter motion this morning, your
17 Honor, so I am sure I will have additional arguments to make,
18 and I would like to reserve my right to do so unless the court
19 wants to hear more.

20 THE COURT: I don't know what point there is going to
21 be. Look, if you want to make a motion in limine later on, you
22 can do that. He has represented there is no electronic
23 version, you have a paper version. I don't know what more we
24 can do.

25 MR. O'CONNOR: I want it to be clear when this goes to

IBRJCMGC

Conference

1 trial and I make a motion for an inference. I believe there
2 should be an inference. They have an Outlook folder for
3 Mr. Wagner they failed to produce in discovery.

4 THE COURT: You can argue what that means in a motion
5 in limine or whatever.

6 MR. O'CONNOR: Great. I'll do that. Thank you.

7 THE COURT: Great. We have deadlines for responses.
8 We have extended deadlines for the rest of discovery and for
9 summary judgment motions in March. Mediation, you mentioned
10 the M word. You have a privately-retained mediator?

11 MR. O'CONNOR: Yes, we selected the mediator and we're
12 trying to get that done in January.

13 THE COURT: You agree with that?

14 MR. MATTHEWS: I do. We are going to try to resolve
15 the case.

16 THE COURT: Great. Anything else?

17 MR. O'CONNOR: That is it.

18 THE COURT: Thanks very much. We're adjourned.

19 (Court adjourned)
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